

International Commercial Arbitration and African States

Practice, Participation and Institutional Development

Amazu A. Asouzu



CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS

The Edinburgh Building, Cambridge CB2 2RU, UK
40 West 20th Street, New York, NY 10011-4211, USA
10 Stamford Road, Oakleigh, VIC 3166, Australia
Ruiz de Alarcón 13, 28014, Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

<http://www.cambridge.org>

© Amazu A. Asouzu 2001

This book is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without
the written permission of Cambridge University Press.

First published 2001

Printed in the United Kingdom at the University Press, Cambridge

Typeface Swift (EF) 10/13 pt System QuarkXPress™ [SE]

A catalogue record for this book is available from the British Library

Library of Congress Cataloguing in Publication data

Asouzu, Amazu.

International commercial arbitration and African states: practice,
participation, and institutional development / Amazu Asouzu.

p. cm. – (Cambridge studies in international and comparative law)

Includes bibliographical references and index.

ISBN 0 521 64132 2 (hardback)

1. Arbitration and award – Africa. I. Title. II. Series.

KQC500 .A85 2001

341.5'22'096 – dc21 2001018482

ISBN 0 521 64132 2 hardback

Contents

<i>Foreword</i>	page xiii
<i>Acknowledgments</i>	xv
<i>Table of cases</i>	xviii
<i>Table of statutes</i>	xxxv
<i>Table of treaties</i>	lxiii
<i>Table of rules</i>	lxxx
<i>List of abbreviations</i>	lxxxvi
General introduction	1

Part 1 Options, parties and concepts

1	Introduction	11
	Introductory remarks	11
	Arbitration as a dispute resolution option in Africa	11
	Conciliation as a dispute settlement option in Africa	15
	Why prefer arbitration in Africa?	27
	Concluding remarks	50

Part 2 Institutional arbitration in Africa

2	Development of institutional arbitration in Africa	53
	Introductory remarks	53
	The influencing bodies and their interactions	54
	The conception of Regional Centres for Arbitration	57
	The AALCC dispute resolution scheme	60
	The international legal personality of the AALCC Regional Centres	65
	The legal relevance of the AALCC host state agreements	77
	Concluding remarks	80

3	Functions and activities of the Regional Centres	81
	Introductory remarks	81
	Proceedings under the Regional Centres	82
	The co-operation agreements between the AALCC and other arbitral institutions	96
	Appraisal of the AALCC dispute resolution scheme	104
Part 3 Legal infrastructure for dispute resolution in Africa		
4	Development of arbitration laws in Africa	115
	Introductory remarks	115
	Dispute resolution in traditional African society	115
	Reinforcing the customary arbitral process	117
	Arbitration law: the legacy of colonialism	119
	Post-independence arbitration laws	123
	Concluding remarks	138
5	Trends in third generation arbitration laws	140
	Introductory remarks	140
	The nature of the arbitration agreement	141
	Subject matter arbitrability	146
	The specificity of international arbitration	158
	Recognising institutional arbitration	168
	The court and the arbitral process	170
	Concluding remarks	175
6	The New York Convention in an African setting: problems and prospects	177
	Introductory remarks	177
	The limitations of the Geneva Treaties and improvements by the New York Convention	180
	Obstacles to the New York Convention in Africa	186
	Concluding remarks	210
Part 4 ICSID arbitration and conciliation: the African experience		
7	African states and the making of the ICSID Convention	215
	General overview	215
	The establishment of ICSID	218
	The ICSID Convention and policy implications for Africa	228
	Concluding remarks	234
8	Jurisdiction <i>ratione materiae</i> under ICSID	235
	Introductory remarks	235

Legal investment disputes	236
The Fedax case	256
Concluding remarks	261
9 Jurisdiction <i>ratione personae</i> under ICSID	267
Contracting States in Africa	267
Constituent subdivision or agency of a Contracting State	268
National of another Contracting State	271
A critique of ICSID awards on Article 25(2)(b)	273
Provisions in bilateral investment treaties on 'nationals of another Contracting State'	300
Concluding remarks	305
10 Consent under the ICSID Convention	307
Introductory remarks	307
Laws and treaties referring to ICSID and other options for dispute resolution	309
Selective examples of laws or treaties	313
Concluding remarks	338
11 The problems of ICSID arbitration without privity	341
Introductory remarks	341
Can a private party derive benefits or enforceable rights under bilateral investment treaties?	342
Consent in writing to ICSID: unilateral and mutual?	346
Illustrative cases and investment treaties	350
Implications of 'unequal' bilateral investment treaties for ICSID proceedings	356
Concluding remarks	362
12 Recognising and enforcing ICSID awards	368
The ICSID Convention: a special mechanism	368
Designations by African Contracting States under Article 54(2)	369
A limited role for the national court or authority	369
Domestic legislative implementation	370
National court decisions: some key issues	378
Solutions to the immunity from execution problem	388
Enforcing ICSID awards against a private party	390
Sanctions for non-compliance with ICSID Awards	394
Observations on ICSID and African states	401

Part 5 Conclusion

13	Lack of growth and development of arbitration in Africa	411
	Introductory remarks	411
	The influence of Latin America on Africa	413
	The disenchantment with and suspicion of arbitration in Africa	416
	Conflict of interests and views	428
	Response to economic imbalance and domination	442
	Concluding remarks	447
	General concluding remarks	449
	<i>Appendix</i>	458
	<i>Bibliography</i>	460
	<i>Index</i>	509

General introduction

International commercial arbitration highlights not only the existence of many controversies in international commercial transactions but also conflicts of interest between developed and developing states. The diversity of the parties to international commercial relations is reflected in their conflicting goals and points of views, making disputes almost inevitable. There is also the rarely articulated but ever-present feeling that African national courts are inappropriate for the resolution of international commercial disputes, leading investors and traders to insist on arbitration or alternative dispute resolution (ADR) mechanisms. These procedures have their particular advantages that may benefit parties to commercial transactions. Their use might also contribute to the economic development and prosperity of African states and their citizens, since such processes can facilitate the efficient allocation of productive resources. Yet, despite their advantages, these dispute resolution methods are little developed in Africa. While some African states are parties to multilateral treaties on arbitration and have enacted specific laws dealing with international commercial arbitration and foreign investment, these same states have misgivings about the international commercial arbitral process. They feel that arbitration runs counter to their interests, undermining national judicial sovereignty and generating considerable expense. Often, cities in these states are not chosen as venues for international arbitral proceedings, nor are their nationals frequently appointed as international arbitrators.

This book focuses on whether arbitration and the ADR methods, as opposed to litigation in national courts in Africa, can contribute to the aspirations and needs of African states and their nationals, whilst at the same time satisfying the expectations of international investors and traders for profit, security and stability, and ensuring fairness and justice

to both parties. Recent developments at the national, regional and international levels tend to lead to the realisation, or at least reconciliation, of the contending expectations. Yet, if it is to fulfil these hopes more fully, the international commercial arbitral process needs complete reorientation, so as to make it compatible with socio-economic development in Africa.

In addition to legislative reassessment of national arbitration and investment laws and accession to arbitral and investment treaties by African states, dispute resolution processes must be fostered in Africa. There is an urgent need for training and education on the dispute resolution processes, for wider publicity of commercial arbitration and conciliation, for the provision of readily available and reliable dispute resolution facilities, for increased trade and investment in and within Africa, and for greater independence of, and efficiency within, national judiciaries.

Scope of the study

There are presently fifty-three states in Africa.¹ The continent is characterised by legal, racial, linguistic and religious pluralism, making it difficult in some subject matters to draw any general conclusions and to discern any uniform trends, a difficulty exacerbated by economic and political volatility. Nevertheless, in this book, uniform developments and trends in commercial arbitration in Africa will be discerned. The study is, however, not an examination of commercial arbitration in every single state in Africa, which would be a very ambitious project. Some studies have already explored the development of commercial arbitration at the national level in Africa.² It would not be profitable and, indeed, would present a problem to classify African states geographically in an attempt to reflect the continent's major legal, economic, political and religious systems. Also, care must be taken not to create or artificially emphasise divisions.³ A problem symptomatic of such an approach is that:

¹ The approach adopted in the Appendix (pp. 458–9) is to name the states of the continent followed by their dates of independence and their former colonial rulers, if any.

² Cotran and Amissah (eds), *Arbitration in Africa* (The Hague: Kluwer, 1996).

³ Cf. 'the Sahara is a sea of communication rather than a chasm of separation': A. A. Mazrui, 'Afrabia', *Journal of Asian-African Affairs* 2, 1990, 137–8. The term 'sub-Saharan Africa' or 'Africa south of the Sahara' is not used in this book. Africa extends from Cairo in the north to the Cape in the south, without abridgment, encompassing, in addition, the island states of the Atlantic and Indian Oceans. It follows that the citation in this book of any publication using such terminology should not be taken as an endorsement.

[s]ome commentators are not yet reconciled to the simple and obvious fact that Africa is an Afro-Arab continent. A quarter of the population of [the] continent is Arab and is represented on both the Organisation of African Unity and the League of Arab States. These societies include the two largest African countries in territory, Sudan and Algeria, and the second largest African country in population, Egypt. There are more Arabs in Africa than there are outside Africa.⁴

For this study, it would be possible to pick and choose representative examples of states from each subdivision of Africa. However, this may be fraught with the problem of making an objective choice. Classification according to legal systems is inevitably arbitrary as well, given that some states of Africa exhibit mixed jurisdiction, combining various elements drawn from common, civil, Roman-Dutch, Islamic and customary laws respectively.

In view of the purpose of this study, the categorisation that appears most sensible is one that looks at the relevance or significance of a state and its participation in, and contribution to, the arbitral process in Africa. By reference to these yardsticks, arbitral developments in Egypt, Nigeria and Djibouti are models.

Of Egypt, in terms of its contribution at the international level, the first African Secretary-General of the United Nations (UN) was an Egyptian, Boutros Boutros-Ghali. The Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) between 1983 and 2000, was Ibrahim Shihata, an Egyptian.⁵ Egypt has ratified most of the arbitration treaties to be examined in this book. In addition, Egypt is host to the first Asian-African Legal Consultative Committee's (AALCC) Regional Centre for International Commercial Arbitration established in Africa.

On the other hand, Nigeria was the first state in the world to ratify the Convention on Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and equally the first in Africa to adopt the Model Arbitration Law and Conciliation Rules elaborated by the United Nations Commission on International Trade Law (UNCITRAL). Additionally, Nigeria is host to the second AALCC Regional Arbitration Centre in Africa.

⁴ A. A. Mazrui, 'The Reparation Debate', *7th Pan African News*, July/August 1993, p. 2.

⁵ In 1995, the ICSID Administrative Council resolved to re-elect Shihata to serve until 2001: *Report of the Secretary-General to the 29th Annual Meeting of the Administrative Council* (Washington DC, 10–12 October, 1995), Annex. However, the Council elected Mr Ko-Yung Tung, born in Beijing, China, on 25 July 2000, to a five-year term as ICSID's Secretary-General. Mr Tung had earlier been appointed Vice-President and General Counsel of the World Bank in December 1999. He succeeded Mr Shihata, a former Senior Vice-President and General Counsel of the World Bank, who retired after nearly seventeen years as ICSID's Secretary-General: *ICSID News Release*, 26 July 2000.

And, finally, Djibouti, a former French colony, was one African state with a modern and comprehensive law on international commercial arbitration prior to the UNCITRAL Model Law in 1985, having enacted a Code of International Arbitration in 1984. Thanks to the modernity of its arbitration law and its strategic geography, Djibouti is a commercial bridge between Africa and the wider Arab world as well as a suitable arbitral venue in Africa.⁶ Indeed, the primary objective of the 1984 Code was to encourage those involved in international commercial transactions to select Djibouti as a seat of arbitration.⁷

As both Egypt and Nigeria had, to varying degrees, adopted the Model Law, the arbitration law of Djibouti presents a contrast to those African states hosting AALCC Regional Arbitration Centres, whose ADR laws are based on the UNCITRAL model. This might well indicate a legislative approach open to African states that reassess their ADR laws. There are, however, some other African states where the Treaty for the Harmonisation of Business Law in Africa (the OHADA Treaty) holds sway.⁸

The above choices may be criticised for omitting important states in Africa; but the selection is strictly for the purposes of this study. No doubt Ghana, Kenya, Gabon, Tunisia and South Africa, etc. are economically and politically significant. South Africa is bound to become even more so in light of political developments there since 1990. South Africa was one of the few independent African states when the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which it has been a party since 1976, was elaborated. Reforms and developments in dispute resolution matters in South Africa since 1995 will enable it to attain a rightful place among the leading arbitral venues in Africa.⁹

Structure of the book

In addition to this general introduction, the book has five parts containing thirteen substantive chapters as well as the general concluding remarks. Although primarily an interdisciplinary examination of dispute resolution regimes affecting or concerning African states and their

⁶ K. Karl, 'Djibouti', *The Courier* No. 174, March–April 1999, 17, 20.

⁷ 25 ILM pp. 1–2; S. K. Chatterjee, 'The Djibouti Code of International Arbitration', *JIA* 4, 1987, 57.

⁸ 'OHADA' is the French acronym of the organisation that sponsored the OHADA Treaty, i.e. *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*. 'OHBLA' is the English acronym of that organisation, i.e. *Organization for the Harmonization of Business Law in Africa*. The former acronym is used throughout this book.

⁹ See chapters 4 and 5 below.

nationals at different levels and written from an African perspective, the book has practical and comparative implications for dispute resolution and foreign investment regimes outside Africa, for non-African states and their nationals.

Part 1, which has a single chapter, is an introduction to the dispute resolution options, parties and concepts considered in the book. The various dispute resolution methods available to commercial parties in Africa, their nature, suitability, relative practical importance and effectiveness are considered, with a preference shown for arbitration.

These issues require a consideration of the institutional infrastructure for dispute resolution in the states where AALCC Regional Arbitration Centres are located. This is the focus of Part 2, which has two chapters – chapters 2 and 3 – dealing with the development of institutional arbitration in Africa. Before 1980, there was no functional arbitration institution in Africa, although various trade associations had limited mechanisms for dispute resolution. This lack of functional arbitral institutions demonstrates the stunted development of the process on the continent. The preference in disputes was for arbitral proceedings to be conducted outside the continent, with the associated cost implications. The justification advanced was that cities in Africa possessed neither the institutional nor the administrative facilities for alternative dispute resolution and that this was unhealthy for the efficiency and effectiveness of the processes. But, following the establishment of UNCITRAL in 1966 and its subsequent involvement with the AALCC, the problem received the attention it deserved, leading to the concept of regional centres for international commercial arbitration. The establishment of the regional arbitration centres, as well as the various national arbitration institutions that have been spawned by their activities, is discussed in Part 2. The argument advanced is that reliance on the facilities of the newer arbitration institutions by disputing parties may hasten the development of arbitral and ADR processes in regions where such institutions exist and further contribute to balance and fairness in international commercial relations.

Parties to disputes rarely select African cities as venues for international arbitration. This is equally true of some international arbitral institutions or arbitrators, when asked to make the choice. Award creditors from outside the continent avoid courts in Africa for the realisation of their credits. In substantive matters, international investors and traders, given the option, are reluctant to litigate before most African courts, an attitude matched by some domestic commercial parties. The justifications, apart from the familiar one of whether courts in Africa can be trusted, are

varied: in relation to arbitration, the relevant state may not be a party to the 1958 New York Convention or other pertinent treaties or regimes, with the result that the enforceability of arbitral awards and agreements cannot be guaranteed. Even when an African state has become a party to the relevant treaties, there might still be the perception that its courts could not be relied on to apply the text correctly or in good faith. It is also argued that national legal frameworks are not conducive for the constitution of arbitral tribunals and to the conduct of arbitration, permitting the 'local court' to interfere unduly in arbitral proceedings.

In response, Part 3, comprising chapters 4 to 6, looks, comparatively, at the emerging legal infrastructure for dispute resolution in Africa. This involves an examination of developments and trends in arbitration laws in Africa and the problems of, and prospects for, the 1958 New York Convention in the African setting. Substantively, the model regimes for dispute resolution created by UNCITRAL are influencing the legislative policies of some African states. Other African states follow the 1999 Uniform Arbitration Act elaborated under the OHADA Treaty. A comparative examination of the features of arbitration legislation in Africa is followed by a close look at the practical utility of, and obstacles to, the 1958 New York Convention and at what legislative measures, if any, have been taken in Africa to implement the New York Convention where necessary. Suggestions are made for improving the New York Convention's remedial dimensions in an African setting.

Part 4, the longest, comprising chapters 7 to 12, deals with the experiences of African states with arbitration and conciliation under the ICSID Convention, the first major arbitration treaty in whose creation African states participated. The ICSID Convention was promoted in the 1960s as vital to a central policy objective of the newly independent African states – that of stimulating private international capital for economic development. As a result, during its elaboration, the Convention received warmer support in Africa than in Latin America or Asia. That support, and some disputes involving African states, revealed early on the practical relevance of the Convention. The rapid conclusion of bilateral investment treaties (BITs) and the enactment of national investment codes making reference to ICSID proceedings, amongst others, led to ICSID's increasing caseload. ICSID's membership, steadily on the rise at any time, is now virtually universal, encompassing states of different ideological backgrounds and at varying stages of economic development. The chapters on ICSID expose the dilemma between the needs generated by the Convention's growing importance and the fulfilment of the purpose for which it was drafted in

the 1960s. Chapter 11, dealing with ‘The problems of ICSID arbitration without privity’, shows not only the problems and dangers of exceeding the Convention’s mandatory limits (especially through unbalanced BITs) but also the Convention’s effectiveness in practice.

Finally, Part 5 comprises chapter 13, which is the substantive concluding chapter, and the ‘General concluding remarks’. Respectively, these explain the lag in the growth and the development of arbitration in Africa and prescribe a way forward.